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PART II

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

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MILK IN THE NEW ENGLAND MARKETING AREA

Recommended Decision and Opportunity to File Written Exceptions on Proposed Amendments to Tentative Marketing Agreement and to Order

[3410–02]

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

[7 CFR Part 1001]

[Docket No. AO–14–A56]

MILK IN NEW ENGLAND MARKETING AREA

Recommended Decision and Opportunity To File Written Exceptions on Proposed Amendments to Tentative Marketing Agreement and to Order

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This decision recommends certain changes in the New England Federal milk order based on industry proposals considered at a public hearing held in November 1976 and January 1977. The major proposed amendments would change the definition of a plant, revise the pooling standards for supply plants, establish the same Class II price at all locations, and increase the maximum marketing services deduction by 2 cents a hundredweight. These revisions are intended to reflect changes in the supply structure for the market and to continue a viable program of marketing services for producers who are not members of a cooperative association. The decision also recommends that a base-excess payment plan for dairy farmers and an advertising and promotion program not be adopted.

DATE: Comments are due on or before January 3, 1978.

ADDRESS: Comments (4 copies) should be filed with the Hearing Clerk, U.S. Department of Agriculture, Washington, D.C. 20250.

FOR FURTHER INFORMATION CONTACT:

Martin, J. Dunn, Marketing Specialist, Dairy Division, Agricultural Marketing Service, United States Department of Agriculture, Washington, D.C. 20250. 202–447–7311.

SUPPLEMENTARY INFORMATION: Prior documents in this proceeding: Notice of Hearing.—Issued October 15, 1976; published October 21, 1976 (41 FR 46454).

Preliminary Statement

Notice is hereby given of the filing with the Hearing Clerk of this recommended decision with respect to proposed amendments to the tentative marketing agreement and order regulating the handling of milk in the New England marketing area, and of the opportunity to file exceptions thereto. This notice is issued pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601 et seq.), and the applicable rules of practice and procedure governing the formulation of marketing agreements and marketing orders (7 CFR Part 900).

Interested parties may file written exceptions to this decision with the Hearing Clerk, United States Department of Agriculture, Washington, D.C. 20250, by the 20th day after publication of this decision in the Federal Register. Four copies are required for this purpose. All written submissions made pursuant to this notice will be made available for public inspection at the Office of the Hearing Clerk during regular business hours (7 CFR 1.27(b)).

The hearing on the record of which the proposed amendments, as hereinafter set forth, to the tentative marketing agreement and to the order as amended, were formulated, was conducted at Framingham, Mass., on November 15–19, 1976, and January 11–13, 1977, pursuant to notice thereof.

The material issues on the record of the hearing relate to:

1. Definition of a plant.
2. Pool supply plants.
(a) Qualifying months and shipping percentage.
(b) System pooling.
3. Assignment provisions.
(a) Assignment of handlers' receipts to utilization.
(b) Class II set-aside.
(c) Inventory variations.
(d) Assignment of diverted milk.
4. Class II location adjustments.
(a) Increase the adjustments.
(b) Decrease the adjustments.
5. Seasonal incentive plans.
6. Advertising and promotion program.
7. Marketing services deduction.

Findings And Conclusions

The following findings and conclusions on the material issues are based on evidence presented at the hearing and the record thereof:

1. *Plant definition.* The "plant" definition of the order should be amended to distinguish on a different basis than now between facilities (plants) at which order prices should apply when they are pooled and facilities that should not be pricing points under the order (bulk reload points). As defined herein, a plant would be the land and buildings, together with their surroundings, facilities, and equipment, whether owned or operated by one or more persons, constituting a single operating unit or establishment for the receiving, processing or packaging of milk or milk products.

Separate premises used for transferring bulk milk from one tank truck to another tank truck (bulk reload points) would not be plants, provided that stationary storage tanks are not maintained and used at such premises. In addition, the cooling of milk, collection or testing of samples, and washing and sanitizing of tank trucks would be recognized as permissible activities associated with the operation of bulk reload points.

Separate premises used as distribution points in the disposition of packaged fluid milk products would continue to be excluded from the plant definition. A proposal to amend the plant definition contained no substantive change concerning distribution points, although the wording of the proposal differed somewhat from current order language. No testimony was presented to revise or clarify the existing language. Consequently, no related change is made in the order and no further discussion of this aspect of the plant definition is contained herein.

The order currently defines a plant in part as an "* * * establishment that is operated by one or more persons engaged in the business of handling fluid milk products for resale or manufacture into milk products and used for the handling or processing of milk or milk products." The definition excludes bulk reload points if facilities for washing and sanitizing cans or tank trucks are not maintained and used on the premises.

Under current provisions, identical facilities used to transfer milk from farm trucks to over-the-road tankers, and to wash and sanitize tank trucks, may be treated either as plants or bulk reload points. This divergent treatment depends on whether the facility is operated by a handler or by someone other than a handler. If handler operated, the facility is a plant and, if pooled, a pricing point for milk received from producers. If operated by someone other than a handler, such as a milk hauler, the facility is not a plant. In this case, milk transferred at such location is treated as direct-shipped milk and is priced at the location of the pool plant where received or the nonpool plant to which diverted. In addition, a handler operating a facility that would otherwise be a plant may establish the facility as a reload point by having trucks washed and sanitized at other locations.

Three cooperative associations (Cabot Farmer's Cooperative Creamery, Inc.; Richmond Cooperative Association, Inc.; and St. Albans Cooperative Creamery, Inc.) proposed that the plant definition be amended to delete the "handler" criterion for determining plant status, as adopted herein.

However, under their proposal, a bulk reload point would be excluded from the plant definition only if the activities performed at the facility are limited to the transfer of milk from one tank truck to another. Any other activity, such as cooling, standardizing, processing, butterfat testing, or the existence of any permanent truck washing or milk storage facilities, would qualify such operation as a plant. The proposal was supported by the Washington and Rensselaer Counties Producers Cooperative Association, Inc.

The proposal received qualified support from two cooperative associations, and it was opposed by a proprietary handler and another cooperative association. These participants presented varying modifications which are discussed later.

Proponent cooperative associations, through their proposed plant definition, seek to eliminate the various means by which handlers have been able to establish as reload points facilities that would otherwise qualify as plants. This has been accomplished by leasing such facil-

ities to milk haulers, who are not persons engaged in the business of handling fluid milk products for resale, or by having trucks washed and sanitized at other locations.

Record evidence establishes that at least 12 of the reload points in operation at the time of the hearing were leased to milk haulers, and at least one had trucks washed at other locations so as to qualify as a reload point. Of the 12 facilities operated under leasing arrangements, 9 were identified as former pool supply plants under the current New England or former Boston Regional order.

The purpose of the proposal, as expressed by proponents, is to establish "plants", and hence pricing points, as close to the farm as possible and to further the present objective under the order of assigning the nearest milk first to Class I use. This is now accomplished, with respect to supply plants, by assigning available Class I use at distributing plants to receipts from supply plants in sequence, beginning with the plant nearest to Boston. Proponents testified that a large proportion of milk that is direct-shipped to pool distributing plants in the nearby plant zone is obtained from distant areas through reload points and should be priced at "plants", near the source of supply, rather than at pool distributing plants. In proponents' view, the order objective of assigning the nearest milk first to Class I use is not being realized because the order does not distinguish between milk direct-shipped to city plants from nearby and distant areas.

A spokesman for one of the proponent cooperatives presented an example to illustrate the above point. In October 1976, quantities of milk shipped from the cooperative's pool supply plant located in Zone 17 to a pool distributing plant in the nearby plant zone were assigned to Class II use. The distributing plant operator also received milk through a reload point located in Zone 27, and such milk received first priority in assignment to the distributing plant's Class I use. If the reload point in Zone 27 had been a pool supply plant, receipts from the plant would have been assigned to Class I use only after the assignment of direct-shipped milk and receipts from proponent's supply plant located closer to Boston.

Proponents documented the degree to which New England handlers have altered procurement practices by shifting from supply plants as a source of supply to direct-shipped milk. The number of pool supply plants declined from 43 in 1966 to 17 by August 1976. On a more current basis, seven pool supply plants were eliminated between August 1975 and August 1976, and the volume of producer milk priced at such plants declined by 12.6 percent during the same time period. Proponents contend that the closing of supply plants, particularly during recent times, was a deliberate action on the part of handlers to convert their supply to direct-shipped milk status. This conclusion is supported by the fact that 10 of the 23 reload points in operation at the time of the hearing were identified as former pricing points under the order.

In proponents' view, this change in procurement practice has enabled handlers to by-pass provisions requiring the assignment of the nearest milk first to Class I use. They estimate that in September 1976, 148 million pounds (60 percent) of the 245 million pounds of nearby plant receipts were assembled largely at distant reload points.

It was estimated also that if the reload point milk had been supply plant milk, about 40 million pounds of milk in Class II uses would have been priced at distant supply plants rather than at nearby plants.

Proponents contend that a change in the point of pricing for milk in Class II uses in the manner they propose would have saved producers 137 thousand dollars in transportation costs in September 1976 (1.64 million dollars on an annual basis). If such milk had been priced at supply plants, handlers, rather than producers, would have incurred the transportation cost for milk in Class II uses at city plants. Proponents state that handlers, by switching to direct-shipped milk as a source of supply, have transferred to producers the cost of moving distant supplies of milk to city plants for Class II use.

A spokesman for two cooperatives (Eastern Milk Producers Cooperative Association, Inc., and Northern Farms Cooperative, Inc.) supported that part of the proposed plant definition that would delete the "handler" criterion for defining a plant. He reiterated proponents' view that the present provision provides the means for handlers to avoid the pricing of milk at country plants, thereby transferring to producers the total cost of transporting milk to market. Both cooperatives fully support a concept of pricing milk close to the farm where produced.

The witness testified also that the plant definition should be amended to provide that trucks may be washed and sanitized at reload points. Otherwise, the definition would provide an incentive for reload point operators to engage in poor sanitation practices to avoid having the reload point defined as a plant. The witness testified that washing and sanitizing trucks is an essential and integral part of a proper reload operation. He said that other functions, such as manufacturing, milk testing, or cooling and storage, should cause a facility to be defined as a plant.

The spokesman for Yankee Milk, Inc., a cooperative association, opposed the proposed plant definition on the grounds that it would eliminate the current flexibility handlers have in obtaining their milk from pool supply plants or having it direct-shipped to their city plants. He testified that the elimination of such flexibility would weaken rather than strengthen milk marketing cooperatives.

The cooperative proposed a modification to the present plant definition. It would permit a handler to designate as a bulk reload point any facility having no manufacturing capacity, provided the handler requested such designation in writing to the market administrator before the month in which the designation would apply, and provided further that any reload facility currently excluded from the plant definition would continue to be excluded for two years from the effective date of any amendment resulting from this proceeding. The association's spokesman stated that the proposed modification would provide complete flexibility for all handlers in determining whether their milk shall emanate from a plant or be direct-shipped. The spokesman further stated that if the modification were not adopted the order should provide that the plant definition be limited to only facilities with manufacturing capacity.

A proprietary handler serving the market opposed the proposed plant definition because, if adopted, five reload points through which the handler currently receives direct-shipped milk would acquire plant status. According to the handler such change in status could result in increased costs since shipping requirements would have to be met in order to qualify the new plants as pool supply plants under the order. Additionally, if these plants were pooled, increased costs would result whenever receipts from such plants were assigned to Class II use at the handler's distributing plants. The handler would then incur the cost of transporting the milk to his nearby zone plants. The witness testified further that costs also would be incurred on supply plant receipts assigned to Class I use since transportation costs exceed the order Class I location adjustments. In a post-hearing brief, the handler recommended that any amendment adopted should be in line with the modifications proposed by Yankee Milk.

Much of the testimony concerning the proposed plant definition focused on whether producers or handlers should stand the cost of transporting milk to city plants for Class II use. The degree to which either producers or processors recover transportation costs depends on the point at which such milk is priced. Milk received at city plants from supply plants is priced at the country location of the plant of first receipt. A handler's Class I and Class II prices applicable at a supply plant in the 21st Zone (between 201 and 210 miles from Boston) are 40 cents and 5.8 cents less, respectively, than the corresponding prices at plants in the nearby plant zone. Additionally, a producer's blend price at the Zone 21 plant is 40 cents less than the city blend price since a dairy farmer delivering milk to the supply plant would not incur the cost of shipping milk to the city. A city processor receiving milk from the supply plant, however, would incur the transportation cost. To the extent milk is used in Class I, the processor would recover 40 cents of the actual transportation cost through the location adjustment. To

the extent milk is used in Class II, the processor would recover only 5.8 cents of the actual shipping cost.

On milk that is direct-shipped to distributing plants, producers pay the hauling cost on all milk delivered regardless of use. The purchasing city processor, on the other hand, accounts to the pool on a classified use basis. The price of milk used in Class I is adjusted to reflect the cost of transporting bulk milk[1] while milk used in Class II reflects the cost of transporting manufactured products. Consequently, producers, through the pool, absorb that portion of the transportation cost that is not paid for by the processor for milk used in Class II.

Proponent cooperatives contend that city processors should bear the cost of transporting milk to the city for Class II use, but avoid doing so by receiving direct-shipped milk. As a result proponents claim they are disadvantaged, relative to suppliers of direct-shipped milk, in competing for city outlets with milk assembled at their supply plants. Two of the proponent cooperatives operated one supply plant each while the other operates two supply plants.

Proponents further testified that they have had to pay all or a part of the transportation cost for milk shipped from their supply plants to distributing plants that is assigned to Class II use. They stated that if they do not, distributing plant accounts may be lost to producers who supply the market on a direct-shipped basis, thus jeopardizing the pooling of their supply plants. It is observed that the pooling problem represents the crux of proponents' testimony to amend the plant definition.

Through their proposal to amend the plant definition, proponents seek to decrease substantially the amount of direct-shipped milk in the market by having reload points, through which such milk is moved, treated as plants. Their proposal would result in "plant" status for virtually all of the 23 reload points in operation at the time of the hearing, if no operational changes were made. This would place most other handlers in the same position as proponents in having to supply a substantial part of the fluid milk needs of the market through supply plants. Additionally, another proposal supported by proponent cooperative associations (discussed under issue 3a) would further encourage city processors to utilize supply plants rather than direct-shipped milk.

The plant definition should not be amended for this purpose. No valid economic goal would be achieved in discouraging the use of direct-shipped milk to supply market needs. There is no evidence that producers, for the most part, are unwilling to supply the needs of city processors on a direct-shipped basis. To the contrary, the record amply demonstrates that city processors increasingly have obtained direct-shipped milk from producers at varying distances from the market center at existing price levels. There is no evidence that the creation of numerous additional supply plants by administrative fiat is necessary to insure that the market is adequately supplied with milk or that more orderly marketing conditions would result than can reasonably be expected from the use of direct-shipped milk.

The record evidence establishes that existing supply plants serve a useful function in balancing an important part of the fluid milk needs of the market and in supplying milk of standardized butterfat content as desired by certain handlers. They supply various city processors with milk as needed and serve as manufacturing outlets for milk which is in excess of the weekly and seasonal needs of such processors. Ten of the 16 supply plants in operation at the time of the hearing were substantially involved in the processing of manufactured dairy products. Dairy farmers delivering to supply plants share in the total fluid milk sales of the market throughout the year since such plants are pooled in recognition of the service they provide in supplying a part of the fluid milk needs of the market.

Although supply plants serve a useful function, steps should not be taken to create administratively additional plants merely to decrease the quantity of milk that is direct-shipped to city plants. The order establishes the class prices that are necessary to insure an adequate supply of milk for the market and to encourage the movement of that milk toward the consuming centers. Within the pricing structure, it is expected that city processors will assemble milk in the most efficient manner to compete successfully with other processors.

The conversion over the years to direct-shipped receipts represents a procurement method adopted by city processors to reduce costs in obtaining milk supplies. The fact that they have been successful in obtaining direct-shipped milk demonstrates a willingness by dairy farmers to supply milk on this basis. Order provisions should not discourage this marketing practice.

Proponents may be disadvantaged somewhat in supplying city plants through supply plants, relative to direct-shipped milk, but this represents a business decision to use pool supply plants. For the most part, proponents have the same opportunity as others to supply their accounts with direct shipments of milk. To the extent that this might result in a problem in pooling supply plants, revised shipping standards discussed herein under issue 2(a) should provide some relief. Additionally, direct shipments of bulk milk by a cooperative association in its capacity as a handler are included as qualifying shipments in pooling a group of supply plants. Further changes concerning the pooling of a group of plants (discussed under issue 2(b)) will provide additional flexibility to cooperative association handlers that operate supply plants. Also, order revisions discussed under issue 3(b) are aimed at mitigating Class II assignments at supply plants that result from unavoidable Class II uses at distributing plants.

Although proponents' proposal should not be adopted, testimony on the record establishes that a revision of the plant definition is appropriate. The current definition of a plant prohibits a handler from operating a reload point if washing and sanitizing facilities for tank trucks are maintained and used on the premises. Under the order, such handler-operated facilities are treated as plants while identical facilities operated by haulers are treated as reload points.

Handlers have used two methods available to them under these provisions to assemble milk for direct shipment to city plants. One cooperative handler has trucks washed at locations other than where milk is transferred to over-the-road tankers, while other handlers have leased facilities to milk haulers. Nine of ten former "plants" are operated under such leasing arrangements while one is hauler owned. Eight of the nine that are leased have washing facilities for tank trucks. It should not be necessary for handlers to make such cumbersome adjustments to obtain direct-shipped milk.

The sanitation of tank trucks, which is a necessary function associated with the maintenance of a high quality product, can be performed at any location. The performance of such function, however, does not sufficiently distinguish between a plant and a reload point. Handlers should not be encouraged to engage in poor sanitation practices to operate a reload point.

In delineating between plants and reload points, it is desirable to utilize criteria that reasonably reflect the different functions that are performed at plants and reload points. In conjuction with the use of distinguishing characteristics, it is desirable also to revise the plant definition to delete the "handler" criterion as a basis for determining plant status. Failure to do so would result in a situation where identical facilities could continue to be treated as either plants or reload points. Handlers would still find it necessary to lease facilities to milk haulers in order to operate reload points. Arrangements that cause handlers to turn over the partial control of facilities or operations, possibly resulting in a loss of control over the quality of the product, should not be encouraged.

A plant should be a facility at which a dairy farmer's milk is received and where it is processed, packaged and handled in such a manner that the identity of any individual producer's milk is not readily ascertainable. The record establishes that in this market such a facility normally carries on manufacturing operations.

A witness for a cooperative association stated that any time milk is transferred

[1] Various witnesses indicated that the Class I location adjustments are inadequate to cover transportation costs. However, this issue was not open for consideration in this proceeding.

from one tank truck to another, the individual identity of a producer's milk is lost and, consequently, such location should be defined as a plant to establish it as a pricing point if it is pooled. It is possible that a diary farmer's milk could be transferred to more than one tank truck for shipment to different plants. It is also possible that a portion of a dairy farmer's milk may be held overnight in a tank truck for shipment the next day. For the most part, however, the identity of a dairy farmer's milk has been routinely ascertained at the reload points serving the market. The record evidence does not establish any insurmountable problem in this respect.

The degree to which the individual identity of milk can be ascertained decreases at facilities where milk is received and manufactured and where stationary storage facilities are maintained and used. Such facilities increase the likelihood that milk of dairy famers will be commingled to a much greater degree. In the case of stationary storage facilities, milk is assembled and transshioped to a larger number of processing plants than is customary under the operation of a reload point. Such facilities may be used to accumulate milk over weekends and during months of relatively greater production, either for ultimate shipment to fluid milk plants as the need arises or for disposition to manufacturing facilities when not needed in the market for fluid use. In this way a balancing function, as contrasted to a reload function, is performed for the market. The maintenance and use of stationary storage facilities thus provides a reasonable basis (in addition to processing) for distinguishing between a plant and a reload point.

In addition to transferring milk from one tank truck to another, certain other functions should be permitted at a reload point. As provided herein, the cooling of milk, collection or testing of samples, and washing and sanitizing of tank trucks should be recognized as permissible activities associated with the operation of a reload point. These activities insure that high quality milk can be direct-shipped to pool distributing plants. To prohibit such practices would result in situations where handlers would be encouraged to engage in practices that are not conducive to the maintenace of a high quality product.

It is concluded that the plant definition adopted herein provides a reasonable basis for distinguishing between a facility that is a plant and one that is a reload point. The definition will provide appropriate flexibility to handlers in operating reload points for the direct-shipment of milk to pool distributing plants.

The supply plant provisions of the order refer to the plant definition. Consequently, conforming changes are included in the supply plant provisions accompanying this decision to carry out the intent of the adopted plant definition.

2(a) *Pool supply plants—Qualifying months and shipping percentages.* Order provisions for pooling a supply plant should be revised to coordinate the shipping requirements for such plants with the seasonal supply-demand pattern of the New England market. As provided herein, a pool supply plant would be a plant from which in the months of August and December at least 15 percent, and in the months of September through November at least 25 percent, of its total receipts of milk from dairy farmers' farms is shipped as fluid milk products, other than as diverted milk, to pool distributing plants. Currently, a supply plant, to be pooled, must ship 15 percent of receipts during July and 25 percent of its receipts during August through November.

A proposal to amend the pooling requirements as provided herein was made by four cooperative associations. It was supported by three additional cooperatives and a proprietary handler. One cooperative opposed the proposal.

To share in the pool proceeds of the order, supply plants must demonstrate the ability to furnish market fluid milk needs by shipping milk to pool distributing plants. The performance requirements, however, must be tailored to market conditions to insure that shipments to distributing plants are encouraged during those months when milk for fluid use is most needed. Shipments should not be encouraged to a greater degree than necessary to satisfy fluid milk needs, or during those months of relatively greater milk production. To do so results in uneconomic movements of milk to distributing plants solely for pooling purposes rather than to meet fluid milk needs. Record evidence establishes that the market supply-demand pattern is such that the current order shipping requirements should be revised to discourage uneconomic movements of milk.

Spokesmen for the proponent cooperative associations and the proprietary handler supporting the proposal testified that requiring supply plants to make qualifying shipments to pool distributing plants in July results in uneconomic backhauls of milk. They testified that this occurs when milk shipped from a supply plant to a distributing plant displaces the milk of other producers located closer to the distributing plant. The "nearby" milk must then be shipped back to the supply plant or diverted to other plants for manufacturing.

The month of July should be replaced with December as a month in which supply plants are required to make shipments to pool distributing plants. Milk production during July, although declining seasonally from peak production months, is still relatively high with respect to sales of fluid milk products. In contrast, December is a month of relatively low production and greater fluid milk sales. During the period 1970 through 1976, average daily deliveries by producers serving the New England markets were greater in July than December, except for 1972, while receipts of producer milk used in Class I were greater in December than in July during the entire period. The Class I utilization of producer milk during the two months highlights the relationship of sales to receipts and establishes the need to utilize December rather than July as a qualifying month. For the 1970 through 1976 period, producer milk in Class I averaged 57.6 percent for July compared to 67.3 percent for December.[2]

A cooperative association opposed the deletion of July as a qualifying month. A spokesman stated that it is preferable to pool supply plants in July rather than in August because production is declining in August. With higher production levels in July, the spokesman claimed, the cooperative can pool its supply plants without impairing the efficiency of its manufacturing plants through reduced volume that results from making shipments to distributing plants. However, shipments should be required when milk is needed to meet fluid milk sales, and not when it is convenient to pool a plant without impairing manufacturing efficiency. Deleting July as a qualifying month for supply plants will promote more orderly marketing conditions in that shipments to distributing plants will not be required at a time when supply plants normally are not needed to supplement fluid milk needs.

August marks the beginning of the period when supply plants should be encouraged to make shipments to distributing plants. Average daily deliveries by producers in August were lower than in July during the entire 1970 through 1976 period. Class I utilization of producer milk in August was greater than in July for the same period. Also, August is the beginning of the period when production is encouraged to meet market needs under the market's seasonal incentive plan.

The order currently requires that supply plants must ship 25 percent of receipts to distributing plants in August. This requirement should be reduced to 15 percent of receipts in recognition of the fact that there is a lesser need for supply plants to supply fluid milk needs in August than during other months of the qualifying period. Class I sales and the utilization of producer milk in Class I in August were lower than in any of the other months of September through December during the entire 1970 through 1976 period.[3] Schools open at or shortly after the end of August; consequently, fluid milk sales do not increase significantly until September.

Likewise, the shipping requirement for December should be 15 percent of receipts rather than the 25 percent of receipts that currently applies during the months of September through November. Although fluid milk sales are relatively high in December, compared to

[2] Official notice is taken of the Market Administrator's "Monthly Statistical Report" for December 1976.

[3] Official notice is taken of the Market Administrator's 'Monthly Statistical Report" for October and November 1976.

August, fluid milk processing plants operate on a curtailed basis during the holiday season, a period of relatively low sales. As a result, the balancing function of supply plants in disposing of milk is substantial during this period. A lower shipping requirement is appropriate to preclude the possibility of uneconomic shipments of milk during December.

A cooperative association that opposed the use of December as a qualifying month did so for essentially the same reasons that proponents proposed a lower shipping requirement for December than in other months. A witness representing the association testified that the cooperative's city manufacturing plants are usually operated at capacity during the holiday season. Therefore, the cooperative must leave as much milk as possible at country plants for manufacturing.

December is a month that contains periods of both high and low sales. Due to periods of high sales, supply plants should be required to make shipments to processing plants for fluid use. The shipping requirement should be lower than other months, however, for reasons previously stated.

The spokesman for the opposing cooperative stated that the association would have no objection to the proposed pooling requirements if they applied only to plants in the New England states or to supply plants that are currently pooled under the order. The association suggested that higher shipping requirements (such as 50 percent of receipts) be applied to any new plants that might begin supplying the market. Apparently the cooperative is concerned that the proposed pooling standards could result in the pooling of additional supply plants, thereby decreasing the utilization of producer milk to the detriment of dairy farmers who have historically served the market.

There is no evidence that the moderate reduction in shipping requirements from current levels would result in additional plants becoming pooled under the New England order. Prospectively, however, if additional plants should begin supplying the market, they should acquire pool plant status on the same basis as plants that are currently serving the market. There is no basis in the record of this proceeding to provide a different standard for any new plants than those that apply to current pool plants. The pooling requirements for a supply plant as proposed by proponents, and as provided herein, will promote more orderly marketing conditions and encourage the movement of milk to pool distributing plants for fluid use when it is needed most.

Additional changes are necessary to place other provisions of the order in conformity with the intent of the adopted pooling requirements. The change in the qualifying period for supply plants necessitates a conforming change in provisions that establish the period during which supply plants can attain automatic pool plant status. Supply plants are not required to make qualifying shipments during those months when milk is not needed at distributing plants if they have served the market fluid milk needs during months of relatively short supply. Marketing conditions that establish the need to revise the qualifying months also establish the need to revise the automatic pooling period (from December through June to January through July) to reflect the months when miilk normally is not needed at distributing plants. Conforming changes are also made in the "dairy farmer for other markets" provisions since the application of such provisions is related to the relatively short and flush production periods of the year that determine the basis for the qualifying and automatic pooling months.

2(b) *Pool supply plants—System pooling.* The "system pooling" provisions of the order should be revised to discourage uneconomic movements of milk.

The order now provides a handler with the opportunity to pool a supply plant system during the qualifying period. A plant system may be pooled, in lieu of pooling individual plants, by meeting three conditions. First, the handler's written request for continuation of pool supply plant status, which the plant held under his operation in the preceding month, must be received by the market administrator on or before the 16th day of the month. Second, the group of plants, considered as a unit, must meet the shipping requirements established for individual plants during the month. Third, each plant in the group must meet the shipping requirements for pooling during one of the qualifying months.

The pooling provisions provided herein delete the requirement that each plant in a group must meet the shipping percentage for one of the qualifying months. In place of this condition, each plant should ship at least 5 percent of its total receipts of milk from dairy farmers' farms as fluid milk products, other than as diverted milk, to pool distributing plants in one of the qualifying months. Also, a procedure is established to terminate pool plant status if the group of plants does not meet the shipping requirement for any given month. Termination of pool plant status should be limited to the least number of plants that will result in the remaining plants in the group meeting the shipping requirement. If the termination of pool plant status becomes necessary, the handler should be permitted to designate which plants shall continue to have pool plant status for the month.

A proposal to amend the system pooling provisions of the order was made by a proprietary handler serving the market. The proposal would delete the requirement that each plant in a group must pool individually during one of the qualifying months. As proposed, individual plants in a group would not be required to make any shipments to pool distributing plants. However, each plant in the group would have to have been pooled under the handler's operation in three or more months of August through December of the preceding year rather than the previous month as currently provided. At the hearing, proponent modified the proposal to provide that each plant, in order to pool in December, must have shipped fluid milk products to pool distributing plants during two of the preceding 11 months.

A witness representing the Richmond Cooperative Association (which is a member of the Green Mountain Cooperative Federation, Inc.), supported the modified proposal if other proposals considered under issues 3 (a), (b), and (c) were adopted. The cooperative's support was contingent also on a modification of the proposal to provide that all plants in the group would need to demonstrate a clear association with pool distributing plants at least sometime during the previous 12 months. Further, the cooperative's spokesman stated that, if the proposal were adopted, some means should be established to give the market administrator the authority to call upon a handler to ship milk at any time during the qualifying period if the market administrator determines that milk from such plant is needed.

In a post-hearing brief, four other cooperatives affiliated with the Green Mountain Federation supported the above position. In its brief, Yankee Milk also indicated that it had no objection to the proposal if it were modified to deny system pooling to plants not meeting health requirements and to require periodic shipments to the fluid market.

The thrust of proponent's case is that uneconomic movements of milk result when an individual plant in a group is required to meet the shipping percentage during one of the qualifying months. Proponent points out that shipping requirements for individual plants in a group do not result in a change in the total volume of milk that must be shipped to distributing plants from the group. Proponent contends that individual plant requirements (when considering a group of plants) serve no useful purpose and do not result in a benefit to the market.

Proponent operates a system of 5 pool supply plants to furnish the fluid milk needs of its city distributing plants. Three of the supply plants have substantial manufacturing capacity and are located in Zones 21, 22, and 25. The remaining two, which are receiving operations only, are located closer to Boston in Zones 16 and 20. For the most part, shipments from the two plants closest to the market center would be sufficient to qualify proponent's group of plants for pooling purposes. However, under current provisions, each of the more distant plants is required to meet the shipping requirements during one of the qualifying months.

Milk shipments for pooling purposes from distant plants displace milk that is assembled at the nearer supply plants. The nearer milk, which is then in excess of the distributing plants' fluid milk

needs, must be directed to other plants for manufacturing. In some cases it is necessary to ship such milk back to the manufacturing supply plant from which qualifying shipments were made.

The record establishes the degree to which shipments were made from proponent's three most distant supply plants during the qualifying months of 1974 through 1976. Shipments were made to supplement the fluid milk needs of the distributing plants but, to a substantial degree, they were unnecessary in that they were made solely for pooling purposes. Although proponent did not document the degree to which backhauls actually took place, it is reasonable to conclude that the potential for such uneconomic movements is substantial. In this connection, a witness representing a cooperative association testified that it was necessary to backhaul milk from a Zone 17 supply plant to a Zone 20 manufacturing supply plant when it chose to qualify the latter plant for pooling. Other witnesses also testified that backhauls occur, although actual data were not presented to quantify the extent of such occurrences.

Even if backhauls did not result, shipments from distant plants should not be required when qualifying shipments can be made from plants that are located closer to the consuming centers of the market. Removal of the requirement that each plant in a group meet the shipping percentage for one of the qualifying months will provide proponent, and others in like circumstances, with the opportunity to supply the needs of distributing plants from the most economically located areas.

Cooperative associations, if they so choose, can pool a group of plants to supply the needs of distributing plants on a more economical basis. Under the order, cooperatives can include within a group of plants direct shipments of bulk milk from farmers to pool distributing plants, for which shipments an association is the handler. Direct shipments to distributing plants by a cooperative in its capacity as a handler demonstrate active performance by the association in meeting the fluid milk requirements of the market. Shipments from individual plants in a group should not be necessary for pooling purposes if the over-all performance of the group meets the pooling criteria that, in conjunction with other provisions, assure an adequate supply of milk to meet market fluid milk needs.

Although it is neither necessary nor economical to require that each individual plant in a group meet the pooling requirements in one month, some shipments are necessary. If shipments were not required, individual plants could be pooled in a group indefinitely without any assurance that the plants are in fact maintaining the necessary health approval for the fluid market. The order presently does not require as a condition for pooling that a plant be approved by some health authority. This has not been necessary since all pool plants must supply the fluid market in some manner and thus necessarily must maintain the health approval required by local jurisdictions. However, if a supply plant in a handler's system were not required to make any shipments, there would be no incentive, particularly in the case of a manufacturing plant, to maintain health approved for the fluid market.

The required shipment of milk to pool distributing plants is the only manner available on the basis of this record to demonstrate that a plant is actually eligible to furnish a portion of the fluid milk needs of the market.

Proponent's modification would require that each plant in a group ship milk to distributing plants during any two months of January through November in order to pool in December. The amount that would have to be shipped, however, was not specified.

Under the modification, any shipment by a plant (even a few gallons) would qualify it for pooling purposes. This minimum or "token" shipment would not provide sufficient performance by the plant to demonstrate its ability to serve the fluid market. Further, an unspecified shipping requirement would result in differing minimum degrees of performance among handlers. A specified shipping requirement should be applied that will result in equal treatment among handlers. Accordingly, the order should provide for a specified percentage of receipts that results in more than a "token" shipment but does not result in the uneconomic backhaul of substantial quantities of milk. The demonstration of an ability to perform should be made during those months when milk is most likely to be needed to meet fluid milk needs (i.e., the qualifying months) rather than during months when additional shipments are not necessary to meet the demand for fluid milk.

It is concluded that each plant should be required to ship at least 5 percent of its receipts to pool distributing plants during one of the months of August through December in order to pool in a group of plants. Such shipping requirement is reasonable in that it encourages neither token shipments nor uneconomic movements of milk.

The requirement that each plant in a group must have been pooled under the handler's operation in the preceding month should be continued rather than the proposed three or more months of the August through December period of the previous year. No evidence was presented from which it might be concluded that the adoption of a more restrictive pooling requirement would be appropriate. Also, there is no basis in the record for a provision to "call" on milk from supply plants. The provisions provided herein for pooling a group of plants will not result in any reduction from the total volume of milk that would otherwise be shipped by individual supply plants to fluid milk plants.

3(a). *Assignment provisions—Assignment of handlers' receipts to utilization.* The current order sequence for assigning receipts of milk from producers and plants to a distributing plant's Class I utilization should be continued. Under this procedure, milk received at a pool distributing plant from producers is assigned to Class I, except for a limited assignment of such milk to Class II, prior to the assignment of any receipts from pool plants. Any Class I use remaining after the assignment of producer receipts is assigned to receipts of fluid milk from pool plants in sequence, beginning with the plant in the zone nearest to Boston.

These provisions became effective on April 1, 1976, when the Boston Regional and Connecticut orders were merged to form the current New England order. Previously, supply plant milk under the Boston Regional order was assigned to a handlers' Class I utilization at his distributing plant before the assignment of producer milk, if the milk had been received from a plant operated by another handler. Milk that was received from the handler's own supply plant was asisgned to any remaining Class I use after the assignment of producer receipts to Class I milk.

The reasons for the change in the sequence in which these two sources of milk are assigned to Class I use were set forth in the Assistant Secretary's final decision issued on January 26, 1976 (41 FR 4456). Official notice is taken of such decision.

Under current order provisions, receipts from a supply plant at a distributing plant are assigned, with limited exception, to Class II use if the volume of producer receipts exceeds the volume of Class I use at the distributing plant. This results in such shipments being priced as Class II milk at the supply plant. As preivously stated, Class II location adjustments do not reflect the cost of transporting milk in bulk form from outlying areas to the consuming centers of the market. Consequently, either the distributing plant or the supply plant operator must absorb that portion of the transportation cost that is not refletced in Class II location adjustments.

Four cooperative associations contend that milk from supply plants should not be assigned to a distributing plant's Class II use during the months when supply plants must make shipments to distributing plants to attain pool plant status. They proposed that during August through December milk that is received at a pool distributing plant from a supply plant be assigned to Class I use prior to the assignment of milk that is received at the distribution plant directly from producers. In this way, the application of Class I location adjustments would cover the cost of transporting bulk milk from the supply plant to the distributing plant for pooling purposes. The proposal was supported by three additional cooperative associations, while one cooperative opposed it.

A proprietary handler who operates distributing plants in the nearby plant zone and 5 supply plants also supported the proposal, but for all months of the year rather than just during the qualifying months. The handler testified that

his cost for Class II milk received from the supply plants is greater than that of other plant operators who rely on only direct-shipped milk. He testified that a change in the assignment sequence would make the Class II "set-aside" provisions unnecessary (discussed under issue 3(b)) and would permit the class assignment of interplant transfers to be known in advance. The handler contended that current assignment provisions can result in the inconvenience of billing adjustments on some inter-handler sales because the classification of such sales is not known until after audit by the market administrator. He testified that adoption of the proposed assignment sequence would reduce the present incentive for distributing plants to receive direct-shipped milk. Apparently, this is the chief objective of proponents.

The operator of a supply plant normally will not find it advantageous to ship milk to distributing plants in the consuming centers of the market unless he can recover the transportation cost on all of the milk involved. It is to his benefit, therefore, to seek a buyer who has essentially only Class I uses. Often, however, the buyer is interested in obtaining milk for other than Class I use. This stems from the fact that "soft" products, such as cottage cheese and yogurt, are commonly processed in conjunction with fluid milk operations.

Handlers in the New England market, including the proprietary handler supporting the proposal, have Class II operations associated with city distributing plants. To the extent that they require milk for Class II use, they should expect to bear the cost of moving it to the city, unless they can attract on a direct-shipped basis individual producers whose alternative markets are less attractive. The record establishes that, to a large degree, city plants have been able to obtain supplies of milk for all uses on a direct-shipped basis from producers. In such instances, the individual producers pay the cost of moving the milk to the market. As previously stated in this decision, this market practice should not be discouraged.

A reversal of the assignment priority as requested by cooperative associations and the proprietary handler would lower the total pool value of milk by shifting the pricing point for quantities of Class I milk from the city plant to the country supply plant. In effect, the pool value of milk would be used to subsidize transportation costs on milk moved from supply plants to distributing plants for other than Class I use. This would lower the total payment for milk to all producers in the market. As stated decisively in the Assistant Secretary's decision of January 26, 1976 (41 FR 4456), pool funds should not be used to encourage the shipment of supply plant milk to city plants for other than Class I use.

The fact that supply plants must make shipments to distributing plants to attain pool status does not provide a sound basis for preferential assignment of supply plant receipts to a distributing plant's Class I use. It should be recognized that by pooling their supply plants, cooperative associations and handlers derive a substantial benefit in that they are able to return to their producers a share of the total Class I sales in the market on a year round basis through a relatively limited association of milk supplies with the fluid market. Moreover, if the required shipments from supply plants to distributing plants are not needed for Class I use, as evidenced by their assignment to Class II adjustments should be made in the shipping standards rather than in the assignment provisions. In this regard, the pooling requirements for supply plants provided herein are designed to eliminate the unnecessary and unecomonic shipments that have been made solely for pooling purposes. These pooling provisions coordinate more effectively the shipping requirements with the fluid milk needs of the market.

The fact that billing adjustments on inter-handler sales have occurred does not provide a compelling basis to adopt the proposal. Accordingly, for the foregoing reasons, the proposal is denied.

3(b). *Assignment provisions—Class II set-aside.* The "set-aside" for butterfat should be increased to 25 percent of butterfat in Class I route disposition or the remaining Class II butterfat, whichever is less. The rate currently provided in the order should be retained for skim milk.

Under current order provisions, a limited quantity of producer receipts at a pool distributing plant (which plant also receives bulk fluid milk products from pool plants located outside the nearby plant zone) are assigned to Class II use prior to assigning the remainder of such receipts to Class I use. This results in the assignment of an equivalent amount of bulk receipts from pool plants to Class I use. The quantity of receipts set aside for Class II use is limited to 6 percent of the distributing plant's Class I route disposition or the remaining Class II use, whichever is less. The 6 percent maximum set-aside applies to both butterfat and skim milk.

It is not reasonable to expect a distributing plant to maintain 100 percent Class I utilization of its receipts. Even a plant that is exclusively engaged in the processing of fluid milk products will have certain unavoidable Class II uses. Most plants will experience some Class II uses resulting from standardization (modification of the butterfat content of milk received from producers in preparation of such milk for bottling uses), shrinkage (plant losses in the processing and packaging of milk), and route returns of fluid milk products.

As indicated in the previous issue, a handler operating a city distributing plant who receives milk from supply plants will incur a greater cost for milk in Class II uses than a distributing plant operator who receives all direct-shipped milk. To the extent that milk is required for substantial Class II uses, the handler receiving milk from a supply plant must expect to bear the cost of moving it to the city. However, to the extent that Class II uses are unavoidably associated with the operation of a distributing plant primarily engaged in the processing of fluid milk products, the handler should be afforded cost comparability with other handlers who receive only direct-shipped milk. It was for this reason that the New England order was amended to provide for a set-aside effective April 1, 1976. A limited assignment of producer receipts to Class II use provides for an equivalent assignment of supply plant receipts to Class I use, thereby providing cost comparability under the order among handlers, whether they receive direct-shipped or supply plant milk, on that portion of Class II use that cannot be avoided in the operation of a distributing plant.

Four cooperative associations proposed that instead of applying the rate of set-aside uniformly to skim milk and butterfat different rates be applied to each component in determining the maximum amount of producer receipts that should be initially assigned to Class II use. Also, they proposed that the rates be varied seasonally. Specifically, the proposed set-aside rates for January through March were 6 percent of skim milk and 10 percent of butterfat in the Class I route disposition of a distributing plant. During April through July they proposed 10 percent of skim milk and 14 percent of butterfat.

At the hearing, cooperatives revised their proposal in two respects. First, the period January through March was changed to August through March. Second, they proposed that the set-aside be applied at distributing plants receiving bulk fluid milk products from pool plants located inside the nearby plant zone as well as at plants receiving such products from plants outside the nearby plant zone. Two cooperatives supported the proposal, while one cooperative opposed it.

Proponents testified that a greater set-aside rate is necessary for butterfat because the butterfat content of producer milk exceeds the butterfat content of milk in Class I route disposition. Consequently, a portion of the butterfat in producer milk received by distributing plants is in excess of the butterfat needed for Class I use. During October 1975 through September 1976, the average butterfat content of Class I products ranged on a monthly basis from a low of 2.95 percent to a high of 3.12 percent, compared to the butterfat test of producer milk which ranged monthly from 3.56 percent to 3.77 percent during the same period. For 1976, the butterfat content of Class I dispositon averaged 2.98 percent while the butterfat test of producer milk averaged 3.68 percent.

The spokesmen for proponents also testified that larger set-aside rates are necessary for both butterfat and skim milk during the months of relatively greater milk production, i.e., April through July. They testified that during this period a greater proportion of supply plant receipts should be assigned to Class I use due to the intensified bal-

ancing function performed by supply plants. Proponents claimed that distributing plants send greater volumes of milk to manufacturing plants for surplus disposal, particularly on weekends, while supply plants ship milk to distributing plants as needed during the week.

A proprietary handler proposed greater set-aside rates than the cooperative associations. The handler proposed that the set-aside for skim milk be set at 10 percent of Class I disposition during August through March and 15 percent during April through July. The proposed rate for butterfat was 50 percent of butterfat in Class I route disposition throughout the year.

Information pertinent to consideration of this issue is contained in an exhibit prepared by the market administrator. For April and September 1976, the exhibit indicates the number of distributing plants at which the set-aside provisions applied, the volume of Class II butterfat and skim milk assigned at such plants to bulk receipts from supply plants, and the minimum set-aside percentages that would have been necessary to preclude any assignment of Class II milk at such distributing plants to receipts from supply plants.

Data contained in the exhibit do not support the claim that it is necessary to vary set-aside rates seasonally to account for greater milk production. In fact, both the volumes of Class II butterfat and skim milk assigned to supply plants, and the minimum set-aside rates that would have been necessary to preclude Class II assignments, were less in April than in September. Therefore, the proposals to establish higher rates for April through July than August through March are denied.

The exhibit also shows that, with respect to butterfat, the current 6 percent set-aside percentage was high enough to preclude Class II assignment to supply plant receipts at only one distributing plant in each of the months of April and September. An average of these computed percentages for 19 distributing plants in April was almost 26 percent, while the average for 23 plants in September was 28 percent.

With respect to skim milk, the current 6 percent rate was sufficient to preclude Class II assignment at 13 distributing plants in April and 10 plants in September. The average of the computed skim milk set-aside rates was 6.37 percent and 8.96 percent for April and September, respectively.

This information does not precisely identify the set-aside rates that should be applied. It is not intended that these provisions should completely preclude Class II assignments to receipts from supply plants. Rather, they are intended to preclude Class II assignments that result from unavoidable Class II uses that are reaonably associated with the operation of a fluid milk plant. However, the fact that the 6 percent set-aside covered all Class II butterfat at only one distributing plant during each of the months indicates that an increase is necessary with respect to butterfat to cover unavoidable Class II uses that are associated with the operation of a distribution plant.

A proprietary handler presented data concerning the operation of one of his distributing plants (which acounted for most of the Class II use in the market that was assigned to supply plants during April and September) to support the larger set-aside rates that he proposed. The handler identified five categories of Class II use at the plant and expressed such uses as a percentage of Class I disposition of butterfat and skim milk for November 1975, and May and September 1976. For the most part, however, the data are not restricted to unavoidable Class II uses that result from Class I operations. Actually, the handler wishes to cover all Class II uses at the plant to prevent assignment of such uses to receipts from his five supply plants. The distributing plant has extensive Class II use in addition to Class I use.

The handler testified that three of the Class II uses identified occur at practically every distributing plant, although in varying degrees. Such uses are: (1) Shrinkage and dumpage; (2) disposition of route returns and animal feed, and; (3) fluid milk products used in cream and soured cream. This last category, by far, accounted for the greatest proportion of Class II use for both butterfat and skim milk at the plant. However, these uses are not unavoidable Class II uses that can reasonably be expected in the operation of a distributing plant that is engaged primarily in the processing of fluid milk products. The plant produces substantial volumes of cream and receives cream from the handler's supply plants.

Cream products, and other products identified by the handler, do not represent unavoidable Class II uses simply because their production is related to the same types of equipment utilized at distributing plants, as suggested by the handler. Only that portion of cream, or excess butterfat, that results from the need to standardize producer milk to attain the desired butterfat content of a full line of Class I products should be considered as an unavoidable Class II use.

As pointed out by cooperative associations, and as supported by marketwide data, the butterfat content of producer milk exceeds the butterfat content of fluid milk (Class I) products. A handler receiving direct-shipped milk of average test from producers in sufficient quantities to meet Class I needs will also receive an excess of butterfat. A comparison of the average test of producer milk during 1976 (3.68 percent butterfat) with the average test of Class I products (2.98 percent butterfat) indicates that excess butterfat received would represent about 23.5 percent of the butterfat needed for Class I sales in the market.

In addition in unavoidable Class II use associated with the difference in the butterfat content of producer milk and Class I sales, some additional tolerance is necessary to account for route returns and shrinkage. The first two categories of Class II uses indicated previously for the handler's plant ranged between 1.9 percent and 3.8 percent of the plant's Class I disposition of butterfat. However, the amounts are overstated to the extent that Class II products are included in the data. It is determined that an additional 1.5 percent should be included for such unavoidable Class II uses. A total of 25 percent of butterfat in Class I disposition should represent the maximum amount of butterfat in producer receipts that need be set-aside for Class II use.

The set-aside rate for skim milk should not be changed from the current level. Data presented by the proprietary handler indicate that he would need a rate of about 7–8 percent to cover three of the Class II uses identified. However, this includes Class II uses that result from the standardization of cream, a Class II product, and should not be included as an unavoidable Class II use. Consequently, there is no basis from which to conclude that the current 6 percent rate should be revised.

The modification supported by cooperative associations that would apply the set-aside provisions in the case of distributing plants receiving milk from pool plants either inside or outside the nearby plant zone should not be adopted. The modification was proposed to accommodate a special situation involving the pooling of a cooperative association's distributing plant that is located in the nearby plant zone. The cooperative's distributing plant transfers fluid milk products to other distributing plants that do not always receive bulk fluid milk products from plants located outside the nearby plant zone. Consequently, the set-aside provisions do not apply at the receiving distributing plant. This results in a Class II assignment to some of the malk transferred from the cooperative's distributing plant. If the set-aside applied, some of the shipments would be assigned to Class I use, which would aid the cooperative in meeting the requirement that 40 percent of the receipts at a distributing plant must be used in Class I in order to be pooled under the order.

The set-aside provisions are not intended to be the means for pooling a distributing plant under the order. Therefore, the proposal should not be adopted for the reasons advanced by proponent. If the distributing plant is unable to meet the pooling provisions for a distributing plant, such provisions should perhaps be the subject of another hearing.

3(c). *Assignment provisions—Inventory variation.* The order should not be amended to provide for a special set-aside of producer receipts in Class II at a pool distributing plant to accommodate an increase in ending inventory of butterfat and skim milk over beginning inventory.

Under current order provisions, ending inventory of fluid milk products at a plant that receives milk directly from producers or from a cooperative association in its capacity as a handler is classified in Class II. An increase in ending in-

ventory over beginning inventory can result in the assignment of Class II use to receipts from supply plants at a distributing plant that also receives milk directly from producers.

Four cooperative association's proposed that the assignment provisions be amended to prevent such Class II assignment to supply plant receipts that results when ending inventory exceeds beginning inventory. They contend that inventory variation, which depends largely on the quantity of milk packaged at a plant on the last day of the month, is becoming more pronounced with a trend towards fewer bottling days and larger volume distributing plants. They contend further that, for most city plant handlers, ending inventory consists of packaged fluid milk products that are distributed as such in the following month. In their view, supply plant receipts should not be assigned to Class II use as a result of inventory variation of fluid milk products. Their proposal would result in a Class I assignment to supply plant receipts in a volume equivalent to any increase of ending inventory over beginning inventory. Class I assignment to receipts of milk received directly from producers would decrease by a corresponding amount.

The proposal was submitted in conjunction with the proposal dealing with the Class II set-aside, which was considered under the preceding issue. Other cooperative associations and a proprietary handler supported the entire proposal, while one cooperative opposed it. However, no witnesses supporting or opposing proponents' proposal testified specifically with respect to the assignment of inventory variation.

As pointed out previously, an increase in ending inventory depends primarily on the quantity of milk processed on the last day of the month. Consequently, Class II use that results due to ending inventories at a distributing plant that is primarily engaged in the processing of fluid milk products can be construed to represent an unavoidable Class II use. As established in the previous issue, a supply plant should not receive a Class II assignment on shipments to a distributing plant for fluid use as a result of Class II uses that cannot reasonably be avoided. However, proponents' proposal would not be limited in application to only those distributing plants that are primarily engaged in the processing of fluid milk products. It would apply to all distributing plants that receive milk directly from dairy farmers and supply plants.

Testimony on the record of this proceeding establishes that some distributing plants have substantial Class II uses. Application of the proposal at such a plant would result in a reduction of pool proceeds to cover the cost of moving milk to city plants for other than Class I use. Receipts of direct-shipped milk from producers should not be assigned to Class II use, and supply plant receipts should not be assigned to Class I use, as a result of increasing inventories at a distributing plant that has substantial Class II use. Since the proposal does not provide a basis to distinguish between plants that are primarily engaged in the processing of fluid milk products and other plants, or does not provide a way to limit such assignment to the extent that increasing inventories would be expected at fluid milk plants, it must be denied for the reasons stated in the two preceding issues.

3(d). *Assignment provisions—Assignment of diverted milk.* A change in order provisions is necessary to clarify the application of assignment provisions to milk which a handler has diverted to another plant. The proposed technical change was made by the Dairy Division and it was not opposed at the hearing.

The order now provides that producer milk which is diverted by a handler, including a cooperative association in its capacity as a handler for milk moved from farms to plants, is priced to the diverting handler at the zone location of the plant to which the milk is diverted. However, for accountability purposes under the order, milk that is diverted by a handler is considered to have been received at the pool plant from which the milk was diverted. The classification of such milk at the diverting plant is determined at the plant of physical receipt in accordance with the rules relating to plant transfers.

In the absence of the clarifying change adopted herein, milk diverted from a city distributing plant to a distant manufacturing plant for Class II use could be assigned to the diverting handler's Class I use while other milk received at the diverting plant from another city distributing plant for Class I could be assigned to Class II use. This could occur because diverted milk is considered to be a direct receipt of producer milk, and as such it is assigned to the diverting plant's Class I use prior to the assignment to utilization of milk received from other plants. In this situation, the assignment of diverted milk to Class I use would result in the assignment of receipts from the city distributing plant to Class II use even though such milk was delivered to the city by producers for Class I use and in fact was used in fluid milk products.

In the circumstances described, the diverting city plant handler would receive a windfall since not all of the milk in Class I use would be priced at the city plant. The milk that was diverted for Class II use would be priced to the diverting handler as Class I milk, but at the location of the distant plant where it was physically received. The Class I price would be 40 cents per hundredweight less than the city plant price if the milk were diverted to a manufacturing plant in the 21st zone. On the other hand, the milk received from the city distributing plant for Class I use would be priced as Class II milk at the city, or 5.8 cents higher than the Class II price at the 21st zone. This would result in a reduction of the handler's pool value of milk (34.2 cents per hundredweight on the quantity diverted) at the expense of producers supplying the market.

This problem could occur in situations where there is insufficient Class II producer milk assigned under § 1001.47(b) at the plant of the diverting handler to equal diversions of producer milk by that handler which must be classified as a Class II transfer. The change provided herein would correct the present technical inadequacies of the applicable order provision by reserving sufficient quantities of receipts of milk to cover the classification of diverted milk. Also, it will result in pricing diverted milk in all cases to the diverting handler in accordance with the zone location of the plant of physical receipt, and the specific use-class of the milk.

4(a). *Class II location adjustments—Increase the adjustments.* A proposal to increase Class II location adjustments should be denied.

A proprietary handler proposed that the order Class II price be adjusted for plant location at the same rates that currently apply to Class I and blended prices. The proposal would increase the Class II price at plants located in zones nearer than the 21st zone (201–210 miles from Boston). In the nearby plant zone (Connecticut, Rhode Island, and Massachusetts, except Berkshire County) the Class II price would be 40 cents higher than at Zone 21 plants and would also be 34.2 cents higher than the Class II price that currently applies at such locations. Class II prices at plants beyond the 21st zone would be decreased by greater amounts than under current provisions. For example, at the 25th zone the Class II price would be 4 cents lower than the Zone 21 price, which would also represent a 3.1-cent reduction from the current order Class II price for Zone 25.

Proponent handler operates a pool distributing plant in Zone 4 (between 31 and 40 miles from Boston) and receives milk directly from dairy farmers. In addition, the handler balances his milk requirements with receipts from various pool supply plants. Proponent processes mostly fluid milk products (Class I) but also has some Class II use in cream, ice cream and ice cream mix.

Proponent testified that he is disadvantaged relative to other distributing plants that have Class II use but receive only direct-shipped milk. He stated that the disadvantage results because he pays the transportation cost on supply plant receipts assigned to Class II use. He claimed that other processors who receive only direct-shipped milk do not incur a transportation cost for milk in Class II use since producers pay the cost of hauling milk to plants.

Proponent testified that under his proposal all distributing plants would be affected equally for milk in Class II use, whether received on a direct-shipped basis or through supply plants. Additionally, the resulting higher Class II price at plants in the nearby plant zone would discourage the movement of milk to city plants for Class II use. Proponent noted, however, that to the extent that Class II products would continue to be processed at higher price zones, dairy farmers would receive higher blend prices.

A witness representing a cooperative association member of the Green Mountain Cooperative Federation, Inc., testified in opposition to the proposal. The witness, however, agreed with the intent of the proposal, to promote equity in Class II costs between dealers who purchase supply plant milk and those who receive direct-shipped milk. The witness further indicated that some increase was necessary in Class II location adjustments but that application of the entire 40-cent Class I location adjustment to Class II milk in the nearby plant zone would have an adverse affect on manufacturing operations that compete for sales of products in a national market.

The Green Mountain Cooperative Federation, in its post-hearing brief, reiterated the preceding position. In addition, it is the Federation's view that Class II location adjustments should reflect the cost of moving manufactured products to city markets, rather than bulk hauling costs. They further indicated that the proposal, if adopted, would provide a strong incentive to all handlers to avoid having Class II milk priced at nearby plants. Attempts to minimize Class II use at such plants, they conclude, would leave many producers, currently supplying nearby plants, without a market.

A proprietary handler who operates two pool distributing plants in the nearby plant zone, with significant Class II uses, opposed the proposal. The handler testified that the proposal would seriously disrupt the present alignment of Class II prices between the New England and New York-New Jersey Federal order markets. Additionally, the handler stated that he would be disadvantaged in selling Class II products in competition with handlers regulated under other orders because the Class II market for certain products (such as butter, cheese, yogurt and frozen yogurt) is national rather than local or even regional in scope.

The proposal would result in a substantial misalignment of Class II prices that would create disorderly marketing conditions in the New England and other Federal order markets. Both sales and procurement practices would be disrupted throughout a large region. Many New England handlers would be virtually eliminated from the Class II market due to an inability to compete with handlers regulated under other Federal order markets that would have a substantial price advantage. In addition, plants located in outlying areas of the milkshed would have an advantage in the Class II market by virtue of the lower prices that would apply at such locations. Distant manufacturing plants could be expected to attempt to receive milk by diversion from New England pool plants to attain advantages in Class II markets with resulting disruptive effects in procurement practices over a wide region. Clearly, the far-reaching ramifications on handlers and producers from a price misalignment of the magnitude proposed would not be in the interest of orderly marketing. Therefore, the proposal is denied.

4(b). *Class II location adjustments—Decrease the adjustments.* The announced Class II price should not be adjusted for plant location as provided under current order provisions. Deletion from the order of the schedule of Class II location adjustments will result in the application of the same minimum Class II price at all plants, regardless of their location. The Class II price at plants nearer than the 21st zone will be decreased from current levels while the price at plants beyond the 21st zone will be increased.

Under current provisions, the order Class II price is announced at the 21st zone where no location adjustments apply. The Class II price at plants located in each successive zone (10-mile increments) nearer to Boston is increased by stated amounts. In the nearby plant zone (Connecticut, Rhode Island, and Massachusetts, except Berkshire County) the Class II price is 5.8 cents per hundredweight higher than the Zone 21 price. The Class II price is reduced at plants located in zones beyond 210 miles from Boston. In Zone 25, which included the most distant supply plants serving the market at the time of the hearing, the Class II price is 0.9 cent lower than the Zone 21 price.

Yankee Milk, Inc., which represents a large proportion of the producers supplying the New England market, proposed that Class II location adjustments be eliminated, except for a plus 2-cent adjustment at all plants in the marketing area.

The cooperative association, which supplies the fluid milk needs of a large number of distributing plants, operates three balancing plants in the nearby plant zone that are pooled under the order. The plants have manufacturing facilities, with the principal product being nonfat dry milk which is sold in a national market in competition with products made from milk that is priced at or near the average value of manufacturing grade milk. The cooperative contends that it is competitively disadvantaged in the sale of nonfat dry milk because its raw product cost is higher than that of processors in other areas of the country. The witness representing the cooperative referred particularly to a manufacturing plant pooled as a reserve processing plant under the Middle Atlantic order (Order 4) that processes substantial quantities of nonfat dry milk. The cooperative's proposed plus 2-cent Class II location adjustment at plants in the marketing area would result in a Class II price at its three plants that is equal to the Order 4 minimum Class II price at the Middle Atlantic reserve processing plant.

The cooperative association contends that the financial losses it incurs in handling the market's reserve milk supply is contributing to a loss of membership in the cooperative. It claims that the interests of orderly marketing can best be served by promoting the growth and development of a single cooperative association that can balance the fluid milk requirements of the entire market in a mode efficient manner than currently.

Proponent presented this reasoning with respect to this and to other issues considered at the hearing. In effect, proponent contends that any proposal that would benefit the largest cooperative association should be adopted because more orderly marketing conditions would result.

The proposal was opposed by bargaining and operating producer cooperative associations that represent dairy farmers who supply the New England and New York-New Jersey Federal order markets. Opposing producer views were presented by witnesses representing two federations of cooperative associations (Green Mountain Cooperative Federation and Northeast Dairy Cooperative Federation) as well as individual cooperatives (Eastern Milk Producers, Dairylea Cooperative, and the Richmond Cooperative Association). The proposal also was opposed by a major proprietary handler regulated under the order who operates two distributing plants and five supply plants under the order.

Briefly stated, the preceding interested parties opposed the proposal on the grounds that it would: (1) Have a variable impact on handlers regulated under the order (the Class II price would be increased from current levels at some plant locations and decreased at other locations); (2) result in a misalignment of Class II prices between the New England and New York-New Jersey Federal order markets; (3) reduce the blend price to New England producers; (4) make it relatively more expensive for city plant handlers to receive milk from supply plants for Class II use, thereby further encouraging the receipt of direct-ship milk; and (5) apply indiscriminately to all milk in Class II without regard to different market values for various Class II uses.

Several cooperative associations, either at the hearing or in post-hearing briefs, indicated that the current Class II location adjustments are inadequate to cover the cost of transporting manufactured products, such as nonfat dry milk, to the market from distant supply areas where manufacturing should be done. Consequently, they believe that location adjustments for milk in Class II uses should be increased rather than decreased. A witness representing the opposing proprietary handler testified that a Class II location adjustment that recognizes the cost of shipping cream from country locations to city plants is the minimum adjustment that should be included in the order. Additionally, the handler stated that even if the Class II price is lowered in the marketing area, the minus location adjustments should continue to apply at plants located beyond the 21st zone to encourage manufacturing at distant plants rather than

discouraging it by making it more costly in relation to city plants.

Ideally, a market's reserve supply of milk that is in excess of daily and seasonal fluid milk requirements should be manufactured at plants located in close proximity to the distant production areas that serve the population centers of a market. The New England market, however, is structured so that substantial manufacturing capacity is maintained in close proximity to the consuming centers of the market. As indicated, the largest cooperative association serving the market operates three manufacturing plants in the nearby plant zone that are pooled under the order. Relative to the basic Class II price, the application of a plus 5.8-cent Class II location adjustment at such plants increases the association's cost of handling reserve milk that must be disposed of in connection with balancing the fluid milk needs of distributing plants.

While the Class II location adjustments should be eliminated, this should not be done for the single purpose of promoting the growth of the proponent cooperative association, as was suggested at the hearing. There is no basis to conclude from the record evidence that the existence of only one cooperative assciation in the New England market would be in the public interest or that more orderly marketing conditions automatically would result, in contrast to current conditions where there are now several cooperatives marketing milk in the New England market. Instead, it is in the interest of orderly marketing to promote the growth and development of cooperative associations in general since such organizations provide a means by which individual dairy farmers, acting collectively, can improve the conditions under which they market their milk.

A review of the development of the present Class II location adjustments in the light of current marketing practices and conditions clearly indicates that such adjustments are outmoded in terms of current marketing conditions and be eliminated entirely.[4] The current adjustments for each zone are identical to those contained in the order regulating the marketing of milk in the Massachusetts-Rhode Island-New Hampshire marketing area in 1967. However, the adjustments for country plants in zones 5 (41 to 50 miles) through 41 (401 miles and over) are identical to those implemented in the Boston order in 1949. At that time the adjustment for each zone beyond 40 miles from Boston reflected the difference between the transportation cost from each zone to Boston and the transportation cost from the 201–210 mile zone to Boston. Transportation costs were based on rail tariff charges for shipping 40 percent cream in 40-quart cans and nonfat dry milk. Order provisions also provided for automatic changes in country plant zone adjustments based on published increases or decreases of rail tariffs for transporting cream in 40-quart cans in carlots of 100–199 cans.

For plants located within 40 miles of Boston, the Class II adjustment in 1949 was plus 38.1 cents per hundredweight, which reflected the cost of shipping whole milk to the city from the 201–210 mile zone by tank car. Provision for automatic changes in the location adjustment based on rail tariffs for transportation of milk in carlots in tank cars also was provided. The 38.1 cents was reduced to 5.8 cents in the Greater Boston order in 1959 to reflect the cost of hauling cream from the 21st zone to Boston. The 5.8-cent adjustment already had been applied at city plants of the various secondary milk markets in New England for the same purpose.

A rezoning of country plants under the Greater Boston order on the basis of highway miles rather than rail mileage was effective in 1957 as the reliance on railway service to move milk had declined markedly. However, no change was made in the Class II location adjustments since it was determined that the effect of the revised basis of zoning on handler costs or producer returns would be inconsequential.

The current Class II location adjustments were intended to accommodate marketing practices and conditions that generally no longer exist. As indicated throughout the record of the current proceeding, the adoption of technological advances in production, processing and distribution and improved transportation systems have reshaped the several former separate fluid milk markets into one large regional milk marketing area. The many country supply plants that were once necessary to assemble milk for rail shipment to city plants have been closed as milk from larger bulk tank diary farms in an expanded production area is now direct-shipped by tank trucks to fluid milk plants. Cream shipments from country plants to distributing plants, which were once substantial, are now an insignificant proportion of total receipts in the New England market. As indicated in a previous issue, the direct shipment of average test producer milk results in an excess of butterfat at fluid milk plants. It is no longer necessary, or appropriate, to adjust Class II values to reflect the cost of transporting cream to different locations. It is also no longer appropriate to adjust Class II prices to reflect nonfat dry milk shipping costs to different locations. The market for nonfat dry milk, as well as other manufactured dairy products, is national in scope in contrast to the more local market characteristics that prevailed when railway shipping costs for nonfat dry milk were recognized as a component of Class II location adjustments under the order.

The New England order Class II price is the basic formula price for the month (the average price of manufacturing grade milk in Minnesota and Wisconsin), subject to seasonal adjustments.

The seasonal adjustments result in Class II prices that are below the Minnesota-Wisconsin price during March through June and above the Minnesota-Wisconsin price during the remaining months. The seasonal adjustments, when weighted by the volume of milk in Class II uses, are intended to result in a yearly average Class II price for the New England market that approximates the yearly average Minnesota-Wisconsin price.

The New York-New Jersey and Middle Atlantic orders also utilize the Minnesota-Wisconsin price, with seasonal adjustments similar to those in the New England order as the Class II price. In virtually all other Federal order markets the surplus class price is the Minnesota-Wisconsin price without seasonal adjustment. This results in general price comparability throughout the Federal order system for milk that is in excess of fluid milk requirements. Such price comparability is essential because products such as butter, nonfat dry milk and cheese that are manufactured from Federal order producer milk are sold in a market that is national in scope. Such products compete with identical products made from manufacturing grade milk which has essentially the same market value at all locations. This is because milk can be converted into storable, concentrated dairy products that can be transported substantial distances at a low cost relative to raw milk, which is both bulky and perishable. Consequently, the value of fluid grade milk that is utilized in such products is no different than the value of manufacturing grade milk that is used in identical products. The Minnesota-Wisconsin price is an average of prices paid for manufacturing grade milk by plants that manufacture butter, nonfat dry milk and cheese. The use of such price in the Federal order system as the surplus class price achieves the necessary price comparability throughout most of the nation for milk used in manufactured products.

Producers should not be compensated or penalized for shipping milk to specific locations for Class II use through the application of location adjustments. The plus 5.8-cent location adjustment in the nearby plant zone compensates producers to some minor extent for shipping milk to city plants for Class II use. However, this places proponent cooperative association at a competitive disadvantage in disposing of nonfat dry milk in a national market relative to other plants in the market and throughout the country. On the other hand, handlers operating distant plants where minus adjustments apply, have a competitive advantage over the proponent cooperative and other plants in the country. Also, producers delivering to such plants do not receive a

[4] Official notice is taken of final decisions issued December 15, 1948 (13 FR 8156); March 8, 1954 (19 FR 1384); December 5, 1956 (21 FR 9767); June 18, 1959 (24 FR 5152); and October 13, 1967 (32 FR 14502) which relate to the development of the Class II location adjustments.

value for milk in Class II uses that is commensurate with the value of manufacturing grade milk.

For the foregoing reasons, Class II location adjustments in the New England market should be eliminated. No recognition should be given to proponent's objective to provide a Class II price at its manufacturing plants that equals the the Class II price at a pool plant under Order 4. Under Order 4, the average Class II price is 2 cents per hundredweight over the Minnesota-Wisconsin price. There is no evidence in the record of this hearing that proponent competes exclusively with the Order 4 pool plant in the disposition of nonfat dry milk. To the contrary, the evidence is that the market for such product is national in scope. Accordingly, the national market considerations, previously indicated, that require price comparability in surplus pricing are overriding in this matter.

Elimination of Class II location adjustments will alter the Class II price alignment between the New England and New York-New Jersey Federal order markets. At some locations, the difference between the order prices will narrow while at others it will increase. For this reason, certain producer associations indicated that any consideration of Class II location adjustments should involve both the New England and New York-New Jersey orders.

The existence of Class II location adjustments in Order 2 does not provide a compelling basis to continue to provide for Class II location adjustments in the New England order that are outmoded under current marketing conditions. Elimination of such adjustments is essential in view of the need to provide surplus price comparability among Federal order markets in general.

Elimination of the Class II location adjustments will result in a price decrease at plants nearer than the 21st zone and a price increase at plants beyond the 21st zone. In addition, such action will result in a very slight reduction of the blend price because the lower Class II price at plants nearer than the 21st zone will more than offset the higher price at plants beyond the 21st zone. However, the reduction will be inconsequential and, thus, should have no impact on the ability of the market to secure an adequate supply of milk.

Opponents of any change in the Class II location adjustments argued that proponent's proposal would lower the Class II price at city plants for all Class II milk without recognizing that milk for certain Class II uses has a greater market value than for other uses. To the extent that milk has a greater value in certain manufacturing uses than in others, an intermediate-price class might need to be considered for the order. However, this was not proposed and a change of this extent could not be adopted on the basis of the evidence in this record. In any case, location adjustments should not be used as a means of reflecting in the order prices an additional value of milk that derives from some basis other than the location at which the milk is received.

The deletion of Class II location adjustments requires several conforming changes which are included in the provisions relating to: class prices; plant location adjustments; computation of value of fluid milk products at class prices; payments to producers; and payments to cooperative associations.

5. *Seasonal incentive plans.* No change should be made in the order's seasonal plan for paying producers on the basis of this record.

Under the current "Louisville" seasonal payment plan money is withheld from payment to producers supplying the market during the relatively high production months (20 cents per hundredweight in March, 30 cents in April and 40 cents during May and June). Funds thus withheld are returned to producers supplying the market during the months of relatively lower production. Twenty-five percent of funds withheld are returned in August, 30 percent in September and October, and remaining funds plus interest are returned in November. The current New England order seasonal payment plan, which is identical to the seasonal payment plan in the adjacent New York-New Jersey order, is intended to encourage level milk production throughout the year.

Yankee Milk proposed that a base-excess plan for paying producers be implemented in place of the current seasonal payment plan to encourage a more even pattern of production throughout the year. The proposal contained detailed provisions to implement the payment plan including definitions of base and excess milk, procedures for computing bases for each producer, establishment of base percentages for producers who either have no base or have relinquished their base, and various base rules. Briefly stated, a daily average base would be computed for each producer on the basis of deliveries to the market during September through November. A daily average base thus computed would be used in making payments to each producer during the following calendar year. For deliveries up to his established base, a producer would receive the higher base price reflecting the marketwide utilization of fluid milk. For deliveries in excess of his daily average base, each producer would receive a lower, excess (Class II) price.

Proponent contended that the proposed base-excess plan would create greater producer awareness of a seasonal incentive program, than at present, because each producer would have a base reflecting his deliveries. In proponent's view the consequences of over-base production (payment at the Class II price) would have a greater individual impact on producers than the current plan. Proponent testified that the proposed plan would provide the best incentive to those producers with the greatest seasonal swing in production to level their production. In addition, proponent stated that the proposal would improve producer cash flow in the spring months (the blend price would not be reduced as under the current plan) and that returns to producers would automatically be adjusted for inflation (current "take-out" and "pay-back" rates represent a smaller proportion of blend prices than when initially established). Also, proponent testified that an objectionable feature of the present plan would be eliminated with a base-excess plan. Presently, producers who receive a higher blend during the "pay-back" months are not necessarily the same producers who supplied the market during the "take-out" months. Proponent anticipates that under a base-excess plan participants would be primarily base holders. Overall, proponent contends that base-excess plans have a better record in encouraging even production throughout the year under Federal order markets than Louisville plans.

Four cooperative associations (Cabot, Northern Farms, Richmond and St. Albans) opposed the base-excess plan and proposed, instead, a modification of the current plan. The cooperatives proposed that a percentage of the Zone 21 blend price be withheld from payment to producers during the flush months of production rather than the current, static rates specified in the order. They indicated that amounts withheld currently do not provide the same incentive for even production as they did when established in 1972, since they now represent a much smaller proportion of the blend price than in 1972. Proponents pointed out that the June 40-cents "take-out" represented 6.9 percent of the blend price in 1972 but only 3.4 percent of the blend price in 1976.

Proponents proposed "take-out" rates, as a percentage of the Zone 21 blend price, are: March, 4 percent; April, 6 percent; and May and June, 8 percent. Application of such percentages would have about doubled the amount per hundredweight actually withheld during March through June 1976. Also, if the proposal had been in effect, the amount returned to producers in the blend price during August through November would have been about twice as much as the amounts returned to producers under the current seasonal plan. In 1976, the seasonal payment funds returned to producers amounted to 36 cents per hundredweight in August, 45 cents in September, 43.8 cents in October, and 27 cents in November. Proponents concede that a doubling of the "pay-back" amounts would increase substantially the disparity between Order 1 and Order 2 blend prices over a wide production area that supplies both Federal order markets.

In a post-hearing brief, proponents of changes in the Louisville plan stated that their proposal is questionable because it would intensify the difference between Order 1 and Order 2 blend prices. Nevertheless, they contend that if more seasonal incentive is needed, their proposal is preferable to the proposed base-excess plan.

In addition to opposition from Yankee Milk, the proposed revision of the Louis-

ville plan was opposed by other cooperative associations (Dairylea, Eastern, National Farmers Organization, and Washington and Rensselaer Counties Producers Cooperative Association). These latter cooperative associations also opposed the base-excess payment plan.

Several cooperative associations contended that consideration of any change in the current Order 1 seasonal payment plan must be conducted on a joint basis with Order 2. Their spokesmen stated that the substantial degree to which the two milksheds overlap requires identical seasonal payment plans, as is currently the case.

In addition to the preceding view, cooperative associations opposed the base-excess plan on the grounds that it is generally not understood by producers supplying the market. They indicated that the proposal is premature in that the necessary educational meetings have not been conducted to fully inform dairy farmers on the workings of such a plan. One cooperative also took the position that the proposed base-excess plan would restrict the entry of producers to the market, thereby discouraging otherwise desirable intermarket supply adjustments in response to price differences. The cooperative also contended that the plan would discourage producers from expanding their operations, thereby benefitting established producers at the expense of new producers and deterring the development of more efficient dairy farms. Also, the association contended that base-excess plans have a greater tendency than Louisville plans to increase fall production, which would result in an unneeded increase in annual milk production and lower blend prices.

A proprietary handler supported the concept of striving to attain an even pattern of production throughout the year. A witness representing the handler stated, however, that it would take from 9 months to a year to adjust to company's computers to accommodate a change to a base-excess plan, with substantial initial costs and subsequent maintenance costs to the firm. The witness indicated that, in view of these substantial costs, the base-excess plan should be adopted only if there are definite and persuasive reasons for concluding that it would result in a substantially better seasonal pattern of production than the present (or proposed) Louisville plan.

Both Louisville plans and base-excess plans provide incentives to attain a desired even pattern of production. Each is specifically authorized by the Agricultural Marketing Agreement Act. However, there is no conclusive evidence in the record of this proceeding from which to conclude that one plan would be more effective than the other in attaining the desired result. In the final analysis, the question of which seasonal plan should be used must be decided largely on the basis of the desires of the majority of the producers affected. It is evident from the record that neither the proposed base-excess plan nor the proposal to revise the present "Louisville" plan is favored by the majority of producers supplying the market.

It may well be appropriate to consider the issue of seasonal pricing plans in Order 1 on a joint basis with Order 2 as suggested by various cooperative associations if it is necessary to attain a more even pattern of production. A large proportion of the New England supply area is also a supply area for the New York-New Jersey market. A substantial change in the blend price relationship in a common production area could create producer dissatisfaction and would not be warranted unless there are disorderly marketing conditions in the New England market resulting from severe seasonal production patterns.

In this regard, the record of the proceeding does not establish the existence of disorderly marketing conditions in New England as a result of current production variations. There is no shortage of milk for fluid use during the months of relatively low production, and there is no surplus of production beyond the capacity of the market's plant facilities during the months of relatively high production. In fact, the record establishes that the seasonal production pattern has improved since 1972. The range in production from the high month of production during the "take-out" period to the low month of production during the "pay-back" period was 19.4 percentage points in 1972, 23.5 percentage points in 1973, 19.4 percentage points in 1974, 16.0 percentage points in 1975, and 17.7 percentage points in 1976.

For the reasons stated herein, it is concluded that the current New England seasonal payment plan should not be revised. The proposals to implement a base-excess plan and to increase the Louisville payment plan "take-out" rates are hereby denied.

6. *Advertising and promotion program.* The order should not be amended to provide for an advertising and promotion program.

A cooperative association proposed that an advertising and promotion program, as authorized by the Agricultural Marketing Agreement Act, should be provided in the order.

Seven other cooperatives supplying the New England market opposed the inclusion of an advertising and promotion program in the New England order. The opposition was based on the view that the proposed program for Order I would replace, needlessly, a longstanding, successful, local program with high producer participation.

Proponent's spokesman gave no evidence to support the claim that it is necessary to establish an advertising promotion program under the order to promote, advertise and conduct research for milk. In fact, the witness stated that the present advertising and promotion program, which is not under USDA auspices, is achieving these objectives. The record establishes that about 88 percent of the producers supplying the New England market participate in the advertising and promotion program now operating.

The present program is being conducted through Milk Promotion Services, Inc. All cooperative associations with members shipping milk into the New England market are affiliated with MPSI. Three cooperatives, including proponent, require mandatory participation in the advertising and promotion program as a condition of membership; other cooperatives do not. Also, there are numerous producers who are not members of a cooperative association who voluntarily participate in the MPSI program the MPSI program is operated through a "positive letter" which informs the producer that unless he indicates otherwise the deduction (6 cents per hundredweight) will be made by the handler who receives his milk.

Proponent's purpose in proposing an advertising and promotion program for inclusion in Order 1 is to improve its membership position in the market. According to proponent, membership in the cooperative is being diminished partly because blend prices paid by proponent are low relative to prices paid by other cooperatives and prices received by producers who are not affiliated with any cooperative association. Deductions that are now being made on a mandatory basis for advertising and promotion purposes were cited by proponent as one reason (among others) that it is experiencing declining membership. Proponent indicated that an advertising and promotion program under Order 1 would relieve it from making such deductions from its members' returns.

In 1972, the proponent cooperative association was formed through the merger of several cooperatives. Each year thereafter, there was a decline in the proportion of milk it handled for the market, and the decline has been at an accelerating rate. Proponent has lost members to other cooperatives which also have mandatory advertising and promotion as a condition of membership. Also, during this period of declining membership for proponent, marketwide promotional participation by producers increased substantially. This suggests that advertising and promotion deductions are not necessary the cause of proponent's loss of membership as claimed. Proponent's spokesman stated that the advertising and promotion deduction was only a minor part of the deductions being made from members for market balancing and other costs. It cannot be concluded that the inclusion of an advertising and promotion program in the order would stop the decline in membership.

The provisions of the Act authorizing advertising and promotion programs are to promote the use of milk and dairy products and not to stem the decline in membership of a cooperative association. It is observed that the proponent association could eliminate deductions for advertising and promotion by providing for the voluntary participation in advertising and promotion as other cooperatives

in the market have done. This is a matter to be decided by the cooperative.

Any advertising and promotion program provided by Order 1 should have widespread support by producers supplying the market. The record of this proceeding establishes that there is a viable advertising and promotion program now being operated in New England which is financed by a very large proportion of the producers supplying the market. The record establishes also that the degree of producer support for a program provided under Order 1 is substantially less.

For the foregoing considerations, it is concluded that the proposed advertising and promotion provisions for the New England market should not be adopted, and the proposal is denied.

7. *Marketing Services Deduction.* The order should be amended to increase the maximum allowable marketing services deduction to 5 cents from the present maximum of 3 cents.

The order provides that in making payments to producers, other than himself and any producer who is a member of a cooperative association which the Secretary determines is performing services specified in the order, each handler shall deduct 3 cents a hundredweight or such lesser amount as the Secretary shall determine to be sufficient for marketing services. The handler is directed to pay the amount deducted to the market administrator on or before the 18th day after the end of the month. The order provides further that the market administrator shall expend the amounts so received only in providing for market information to such producers and for the verification of weights, samples, and testing of milk received from them.

A cooperative association proposed that the marketing services deduction rate for producers who are not members of a cooperative association should be increased to 5 cents from the present rate of 3 cents per hundredweight. Proponent's chief purpose in making the proposal is to bring the marketing service deduction rate for the New England order more in line with such rates for other Federal milk orders. A witness for the association testified that only 4 orders (including the New England order) as of January 1, 1976 had marketing service deduction rates below 5 cents per hundredweight.

Other cooperative associations supplying the market supported the proposal. No testimony in opposition to the proposal was presented at the hearing.

A witness representing the New England order market administrator also testified in favor of the proposed rate increase for marketing services. Testimony introduced into the record by the witness established the key considerations that justify an increase in the maximum rate of deduction.

The marketing services program was made a part of Order 1 in October 1960 with a maximum allowable deduction rate of 2 cents per hundredweight, and the actual rate of deduction was maintained at such level through September 1964. On October 1, 1964, the maximum allowable deduction rate was increased to 3 cents. However, the actual rate of deduction was 2.5 cents through December 1970. Since January 1, 1971, the actual marketing services deduction under Order 1 has been at the maximum allowable rate.

About 84 percent of the expenditures for marketing service work is for salaries and for travel. In this connection, salaries of government workers have been adjusted as needed to approach comparability with workers in the private sector. Since 1971, the comparability increases have raised the basic pay of the market administrator's 18 laboratory technicians by 35 percent. Laboratories are maintained at Dedham, Massachusetts; Middlefield, Connecticut; and Morrisville, Vermont.

In November 1976, 71,023,864 pounds of milk were received from 1,369 producers who were not members of any cooperative association supplying the market. Market information is provided to such nonmembers through the preparation and release of a publication identified as "The Market Administrator's Review." The Review is issued monthly although on occasion, for reasons of economy, the information for 2 months has been combined into a single bimonthly issue. The normal issue of the Review consists of 8 pages although, at times, up to 16 pages have been issued.

In 1971, when the marketing service deduction rate was increased from 2.5 cents to 3 cents, the printing costs of 2,000 copies of an 8-page Review was $275. In October 1976, the cost was $365, an increase of 33 percent. It is anticipated that printing costs will increase further in the foreseeable future. While the cost of printing the Review is one of the minor costs of carrying out the marketing service program, the cost increase involved is, in general, indicative of rising costs of services.

Most of the work conducted under the marketing service program concerns the verification of the weights, samples, and tests of milk received from nonmember producers. At the present time, virtually all of the nonmember milk is received from farm tanks. Accordingly, the verification of the weight of milk centers primarily on the checking of the farm tank calibration and verification that the bulk pick-up drivers correctly read the gauge rods when the bulk milk is picked up. Since the mid-1960's, the market administrator has operated a mobile farm tank calibration checking unit. The truck alone, not including the body or the checking equipment, cost $5,206 in 1973. The replacement cost of the truck with a 1977 model would be $8,076, an increase of 55 percent.

Occasionally, significant errors in farm tank calibration are discovered. Such errors may be as much as 40 pounds or more. Based on current prices, and assuming everyday pick up, a 40-pound error in a producer's tank could mean increased income to the producer of well over $650 per year.

With respect to the verification of samples, it is normal practice to verify samples for at least one month out of every 6 for each nonmember producer. If unsatisfactory conditions are noted, the checking is continued until the conditions are rectified. The twice-a-year verification on a routine basis is considered to be a minimum program—provided there are not indications of any discrepancies in the handlers' procedures. For the first 11 months of 1976, there were on the average 265 producers for whom samples and tests had not been verified within the prior 6 months. The resources devoted to this phase of the marketing service program have been inadequate to achieve the desired frequency of checking.

In the verification of butterfat tests, the estimated value of 0.1 percent butterfat to the average nonmember producer of Order 1 for 1976 was about $650. In the absence of a checking program, it would be difficult for a producer to be confident of the test of his milk to as close as plus or minus 0.1 percent. If the resources were available, it would be desirable to increase the frequency of such checking. On the other hand, it would be very detrimental to the program to reduce the checking further as a result of a shortage of funds for such marketing service work. Such a reduction is prospective if the current maximum assessment rate is maintained.

As has been previously noted, the marketing service deduction under Order 1 has been at the maximum level since January 1, 1971. During this period, increases in the cost of providing the marketing services have been met by reducing the frequency with which the prescribed services were performed, or by achieving economies in rendering the services. Currently, however, the marketing service program is being squeezed between rising costs and fewer opportunities to keep pace with such cost increases through the achievement of efficiencies in the way the program is conducted. This situation possibly can be solved by curtailment of the services rendered. However, such solution would reduce the services provided under the program below a reasonable level and would result in providing inadequate marketing services to the nonmembers.

Prospectively, and at the current maximum rate, it is estimated that receipts from marketing service deductions for 1977 will be 2.4 percent above 1976. On the expense side, it is estimated that total laboratory expenses will be up $55,000 or 15.5 percent above 1976. Nearly 70 percent of the increase in the laboratory expense is accounted for in increases for salaries and related expenses, such as insurance and retirement.

An increase of about $6,000 in estimated travel expenses accounts for a substantial part of the rise in the 1977 budget not accounted for by the increased cost of salaries and related expenses. Recent gasoline price increases and the increasing cost of automobile repair and maintenance are anticipated to add further upward pressure on expenditures for marketing services, as will

the cost of most other items. Budget projections for 1977 indicate a deficit of about $35,000 for the year. This would entirely wipe out a reserve of about $20,000 projected for the end of 1976.

The market administrator has obligations in connection with severance pay should it be necessary for any reason to reduce staff as a result of the elimination of the marketing service program or to curtail the size of the staff. The reserve under the marketing services program should be built up over a period of 2 or 3 years so that it can reasonably cover severance pay contingency.

From the foregoing factual considerations, it is concluded that a larger rate of deduction for marketing services is necessary if the market administrator is to continue to conduct an effective marketing service program for producers supplying the market who are not members of a cooperative association. Without proper farm tank calibration and the verification of weights and tests, the income of producers who are not members of an association could be adversely and significantly affected through inadvertent error. Without timely and accurate market information, producers who are not members of a cooperative association could not plan their respective milk production operations in relation to prevailing and prospective marketing conditions.

It is concluded further that inflationary pressures on critical costs comprising the marketing service program for nonmembers have made it impossible to continue the performance of required services without an increase in the level of expenditures under the marketing service program. Salaries and travel costs, which comprise 84 percent of the expenditures for marketing service, are the types of expenditures that have been subject the most to the impact of inflation. There have been no economic projections that predict an early end to such upward pressures. Since the marketing service program has operated at the maximum allowable rate since 1971, the continuation of an effective marketing service program can be assured only by increasing the maximum allowable marketing service deduction rate to 5 cents per hundredweight.

The new maximum rate of 5 cents per hundredweight proposed herein will permit the market administrator to conduct an effective marketing service program for those producers not receiving such services from a cooperative association. It is anticipated that with the adoption of the new maximum rate of 5 cents provided herein it will be possible, at least for some period of time, to operate at a rate above the present 3 cents but below the proposed maximum.

Rulings on Proposed Findings and Conclusions

Briefs and proposed findings and conclusions were filed on behalf of certain interested parties. These briefs, proposed findings and conclusions and the evidence in the record were considered in making the findings and conclusions set forth above. To the extent that the suggested findings and conclusions filed by interested parties are inconsistent with the findings and conclusions set forth herein, the requests to make such findings or reach such conclusions are denied for the reasons previously stated in this decision.

General Findings

The following findings and determinations supplement those that were made when the order was first issued and when it was amended. The previous findings and determinations are hereby ratified and confirmed, except where they may conflict with those set forth below.

(a) The tentative marketing agreement and the order, as hereby proposed to be amended, and all of the terms and conditions thereof, will tend to effectuate the declared policy of the Act;

(b) The parity prices of milk as determined pursuant to section 2 of the Act are not reasonable in view of the price of feeds, available supplies of feeds, and other economic conditions which affect market supply and demand for milk in the marketing area, and the minimum prices specified in the tentative marketing agreement and the order, as hereby proposed to be amended, are such prices as will reflect the aforesaid factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest; and

(c) The tentative marketing agreement and the order, as hereby proposed to be amended, will regulate the handling of milk in the same manner as, and will be applicable only to persons in the respective classes of industrial and commercial activity specified in, a marketing agreement upon which a hearing has been held.

Recommended Marketing Agreement and Order Amending the Order

The recommended marketing agreement is not included in this decision because the regulatory provisions thereof would be the same as those contained in the order, as hereby proposed to be amended. The following order amending the order, as amended, regulating the handling of milk in the New England marketing area is recommended as the detailed and appropriate means by which the foregoing conclusions may be carried out:

1. Section 1001.4 is revised to read as follows:

§ 1001.4 Plant.

"Plant" means the land and buildings, together with their surroundings, facilities, and equipment, whether owned or operated by one or more persons, constituting a single operating unit or establishment for the receiving, processing, or packaging of milk or milk products. The term "plant" shall not include:

(a) Distribution points (separate premises used primarily for the transfer to vehicles of packaged fluid milk products moved there from processing and packaging plants); or

(b) Bulk reload points (separate premises used for the purpose of transferring bulk milk from one tank truck to another tank truck while en route from dairy farmers' farms to a plant, and at which premises stationary storage tanks are not maintained and used). The cooling of milk, collection or testing of samples, and washing and sanitizing of tank trucks at the premises shall not disqualify it as a bulk reload point under this paragraph.

2. In § 1001.5b, paragraphs (a), (b), (c), and (d) are revised to read as follows:

§ 1001.5b Supply plant.

* * * * *

(a) It is a plant at which facilities are maintained and used for washing and sanitizing cans and to which milk is moved from dairy farmers' farms in cans and is there accepted, weighed or measured, sampled, and cooled, or it is a plant to which milk is moved from dairy farmers' farms in tank trucks.

(b) It is a plant from which in any month of August and December at least 15 percent, and in any month of September through November at least 25 percent, of its total receipts of milk from dairy farmers' farms is shipped as fluid milk products, other than as diverted milk, to pool distributing plants.

(c) For any month of August through December, it is one of a group of plants that meets the conditions specified in this paragraph.

(1) The handler's written request for continuation of pool supply plant status, which the plant held under his operation in the preceding month, is received by the market administrator on or before the 16th day of the month.

(2) The group of plants, considered as a unit, meets the shipping requirements specified in paragraph (b) of this section.

(3) To qualify as a pool supply plant under this paragraph in December of any year, the plant, considered individually, shall have shipped at least 5 percent of its total receipts of milk from dairy farmers' farms as fluid milk products, other than as diverted milk, to pool distributing plants in one of the months of August through December of that year.

(4) In the event of the failure of a group of plants to meet fully the requirements of paragraph (c)(2) of this section, termination of pool supply plant status shall be limited to the least number of plants which will result in the remaining supply plants meeting the requirements of paragraph (c)(2) of this section. If such termination becomes necessary, the handler shall be permitted to designate which plants shall continue to have pool plant status for the month.

(5) For the purposes of this paragraph, any supply plant operated by a cooperative association that is also a handler under § 1001.9(d) may be considered as one of a group of plants. In that event, the group's total receipts of milk from dairy farmers' farms shall be the total of such receipts by the association other than at any of its plants that is not one

of the group, and the group's qualifying shipments shall consist of the qualifying shipments from the plants in the group plus the quantity of milk moved by the association in its capacity as a handler under § 1001.9(d) from farms of its members to pool distributing plants.

(d) For any month of January through July, it is a plant from which at least 15 percent of its total receipts of milk from dairy farmers' farms is shipped as fluid milk products, other than as diverted milk, to pool distributing plants or it is a plant that meets the requirements for automatic pool plant status specified in this paragraph. The automatic pool plant status of a plant shall be revoked for any month for which the market administrator has received the handler's written request for revocation on or before the 16th day of that month. In that event, the plant shall not have automatic pool plant status in any subsequent month of the current January through July period.

(1) The plant was a pool supply plant under this order in each of the preceding months of August through December; or

(2) The plant was a pool supply plant under this order in at least two of the preceding months of August through December and would have been such a plant in all other months in that period had it not been a pool plant under the New York-New Jersey Federal order.

* * * * *

3. In § 1001.11, paragraph (c) is revised to read as follows:

§ 1001.11 Dairy farmer for other markets.

* * * * *

(c) The term includes a dairy farmer with respect to milk that is received from him by a handler at a pool plant or that is purchased from him by a cooperative association in its capacity as a handler under § 1001.9(d) during any of the months of January through July, if the handler caused nonpool milk from the same farm to be received during any of the preceding months of August through December at a plant that is not a pool plant under any Federal order in the current month. The term shall not apply to the dairy farmer, however, if all the nonpool milk was a receipt of producer milk under the provisions of another Federal order or represented receipts from own production by a producer-handler under any Federal order, or was excluded from producer milk under § 1001.15.

* * * * *

4. In § 1001.15, the preamble is revised to read as follows:

§ 1001.15 Diverted milk.

"Diverted milk" means milk, other than that excluded under § 1001.12 from being considered as received from a producer, that meets the conditions set forth in paragraph (a) or (b) of this section and is not excluded from diverted milk under paragraph (c) of this section.

* * * * *

5. In § 1001.43, a new paragraph (d) is added as follows:

§ 1001.43 Assignment of receipts to classes in general.

* * * * *

(d) Prior to the assignment of receipts to classes under §§ 1001.44 through 1001.47, there shall be assigned to Class I and Class II milk the quantities of Class I and Class II milk, respectively, which are diverted in accordance with § 1001.15 and classified in accordance with § 1001.42.

6. In § 1001.47, paragraph (a) is revised to read as follows:

§ 1001.47 Additional assignments to Class I and Class II milk.

(a) At pool distributing plants that have received bulk fluid milk products from pool plants located outside the nearby plant zone, assign to Class II milk a quantity of receipts from producers and cooperative associations in their capacity as handlers under § 1001.9 (d) equal to 6 percent of skim milk and 25 percent of butterfat in the plant's Class I route disposition or the remaining Class II milk at the plant, whichever is less.

* * * * *

7. In § 1001.50, the preamble and paragraph (a) are revised to read as follows:

§ 1001.50 Class prices.

Subject to the provisions of § 1001.52, the class prices per hundred-weight of milk for the month shall be as follows:

(a) *Class I price.* The Class I price at plants located in zone 21 shall be the basic formula price for the second preceding month plus $2.58.

* * * * *

8. In § 1001.52, the words "The class prices" in the preamble are changed to read "The Class I" and paragraph (e) is revised to read as follows:

§ 1001.52 Plant location adjustments.

* * * * *

(e) The location adjustments for each plant shall be the amounts shown in the following table for the zone in which the plant is located:

Location adjustments for determination of zone price

Distance to Boston (miles)	Plant location zone	Class I and blended price adjustments (cents per hundred-weight)
Various	Nearby plant	+40.0
31 to 40	4	+36.4
41 to 50	5	+35.2
51 to 60	6	+34.0
61 to 70	7	+32.8
71 to 80	8	+31.6
81 to 90	9	+30.4
91 to 100	10	+29.2
101 to 110	11	+28.0
111 to 120	12	+26.8
121 to 130	13	+25.6
131 to 140	14	+24.4
141 to 150	15	+7.2
151 to 160	16	+6.0
161 to 170	17	+4.8
171 to 180	18	+3.6
181 to 190	19	+2.4
191 to 200	20	+1.2
201 to 210	21	0
211 to 220	22	−1.0
221 to 230	23	−2.0
231 to 240	24	−3.0
241 to 250	25	−4.0
251 to 260	26	−5.0
261 to 270	27	−6.0
271 to 280	28	−7.0
281 to 290	29	−8.0
291 to 300	30	−9.0
301 to 310	31	−10.0
311 to 320	32	−11.0
321 to 330	33	−12.0
331 to 340	34	−13.0
341 to 350	35	−14.0
351 to 360	36	−15.0
361 to 370	37	−16.0
371 to 380	38	−17.0
381 to 390	39	−18.0
391 to 400	40	−19.0
401 and over	41 and over	(1)

[1] Class I and blended price location adjustments applicable to plants located more than 400 mi from Boston shall be obtained by extending the table at the rate of 1¢ for each additional 10 mi except that in no event shall the class I or blended price at any zone be less than the class II price for the month.

§ 1001.60 [Amended]

9. In § 1001.60(e), the words "applicable Class II prices" are changed to read "Class II price".

§ 1001.73 [Amended]

10. In § 1001.73(a), the words "zone 21" are deleted.

§ 1001.74 [Amended]

11. In § 1001.74(d)(1), the words "zone 21" are deleted.

§ 1001.86 [Amended]

12. In § 1001.86, the "3 cents" specified in paragraph (a) is changed to "5 cents."

Signed at Washington, D.C., on December 6, 1977.

WILLIAM T. MANLEY,
Deputy Administrator,
Program Operations.

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